United Nations A/CN.9/834*

General Assembly

Distr.: General
29 May 2015

Original: English

United Nations Commission on International Trade Law
Forty-eighth session
Vienna, 29 June-16 July 2015

Report of Working Group IV (Electronic Commerce) on the work of is fifty-first session (New York, 18-22 May 2015)

Contents

		Paragraphs	Page
I.	Introduction	1-12	2
II.	Organization of the session	13-19	4
III.	Deliberations and decisions	20	5
IV.	Draft provisions on electronic transferable records	21-108	5
V.	Other business	109-110	18

* Reissued for technical reasons on 9 June 2015.

V.15-03864 (E) 020615 030615

Please recycle

I. Introduction

1. At its forty-second session, in 2009, the Commission requested the Secretariat to prepare a study on electronic transferable records in the light of proposals received at that session (A/CN.9/681 and Add.1, and A/CN.9/682).[1]

2. At its forty-third session, in 2010, the Commission had before it additional information on the use of electronic communications for the transfer of rights in goods, with particular regard to the use of registries for the creation and transfer of rights (A/CN.9/692, paras. 12-47). At that session, the Commission requested the Secretariat to convene a colloquium on relevant topics, namely, electronic transferable records, identity management, electronic commerce conducted with mobile devices and electronic single window facilities.[2]

3. At its forty-fourth session, in 2011, the Commission had before it a note by the Secretariat (A/CN.9/728 and Add.1) summarizing the discussions during the colloquium on electronic commerce (New York, 14-16 February 2011).[3] After discussion, the Commission mandated the Working Group to undertake work in the field of electronic transferable records.[4] It was recalled that such work would be beneficial not only for the generic promotion of electronic communications in international trade, but also to address some specific issues such as assisting in the implementation of the United Nations Convention on the Contracts for the International Carriage of Goods Wholly or Partly by Sea (New York, 2008) (the "Rotterdam Rules").[5] In addition, the Commission agreed that work regarding electronic transferable records might include certain aspects of other topics such as identity management, use of mobile devices in electronic commerce and electronic single window facilities.[6]

4. At its forty-fifth session (Vienna, 10-14 October 2011), the Working Group began its work on various legal issues relating to the use of electronic transferable records, including possible methodology for future work by the Working Group (A/CN.9/737, paras. 14-88). It also considered the work of other international organizations on that subject (A/CN.9/737, paras. 89-91).

5. At its forty-fifth session, in 2012, the Commission expressed its appreciation to the Working Group for the progress made and commended the Secretariat for its work.[7] There was general support for the Working Group to continue its work on electronic transferable records and the need for an international regime to facilitate cross-border use of electronic transferable records was emphasized.[8] In that context, the desirability of identifying and focusing on specific types of or specific issues

---

[1] *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 17* (A/64/17), para. 343.

[2] Ibid., *Sixty-fifth Session, Supplement No. 17* (A/65/17), para. 250.

[3] Information about the colloquium is available at the date of this document from www.uncitral.org/uncitral/en/commission/colloquia/electronic-commerce-2010.html.

[4] *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17* (A/66/17), para. 238.

[5] Ibid., para. 235.

[6] Ibid.

[7] Ibid., *Sixty-seventh Session, Supplement No. 17* (A/67/17), para. 82.

[8] Ibid., para. 83.

related to electronic transferable records was mentioned.[9] After discussion, the Commission reaffirmed the mandate of the Working Group relating to electronic transferable records and requested the Secretariat to continue reporting on relevant developments relating to electronic commerce.[10]

6. At its forty-sixth session (Vienna, 29 October-2 November 2012), the Working Group continued its examination of the various legal issues that arose during the life cycle of electronic transferable records (A/CN.9/761, paras. 24-89). The Working Group confirmed the desirability of continuing work on electronic transferable records and the potential usefulness of guidance in that field. It was widely felt that generic rules based on a functional approach should be developed encompassing various types of electronic transferable records (A/CN.9/761, paras. 17-18). As to future work, broad support was expressed for the preparation of draft provisions on electronic transferable records to be presented in the form of a model law, without prejudice to the decision to be made by the Working Group on the final form (A/CN.9/761, paras. 90-93).

7. At its forty-seventh session (New York, 13-17 May 2013), the Working Group had the first opportunity to consider the draft provisions on electronic transferable records. It was reaffirmed that the draft provisions should be guided by the principles of functional equivalence and technology neutrality, and should not deal with matters governed by the underlying substantive law (A/CN.9/768, para. 14). As to future work, it was noted that while the draft provisions were largely compatible with different outcomes that could be achieved, caution should be exercised to prepare a text that had practical relevance and supported existing business practices, rather than regulated potential future ones (A/CN.9/768, para. 112).

8. At its forty-sixth session, in 2013, the Commission noted that the work of the Working Group would greatly assist in facilitating electronic commerce in international trade.[11] After discussion, the Commission reaffirmed the mandate of the Working Group and agreed that work towards developing a legislative text in the field of electronic transferable records should continue.[12] It was further agreed that whether that work would extend to identity management, single windows and mobile commerce would be assessed at a future time.[13]

9. At its forty-eighth session (Vienna, 9-13 December 2013), the Working Group continued its work on the preparation of draft provisions on electronic transferable records. The Working Group also took into consideration legal issues related to the use of electronic transferable records in relationship with the Convention Providing a Uniform Law for Bills of Exchange and Promissory Notes (Geneva, 7 June 1930) and the Convention Providing a Uniform Law for Cheques (Geneva, 19 March 1931) (A/CN.9/797, paras. 109-112).

10. At its forty-ninth session (New York, 28 April-2 May 2014), the Working Group continued its work on the preparation of draft provisions as presented in document A/CN.9/WG.IV/WP.128 and its addendum. The Working Group focused on the discussion on the concepts of original, uniqueness, and integrity of an

[9] Ibid.

[10] Ibid., para. 90.

[11] Ibid., *Sixty-eighth Session, Supplement No. 17* (A/68/17), para. 227.

[12] Ibid., paras. 230 and 313.

[13] Ibid., para. 313.

electronic transferable record based on principles of functional equivalence and technological neutrality.

11. At its forty-seventh session, in 2014, the Commission took note of the Working Group's key discussions at its forty-eighth and forty-ninth sessions.[14] Noting that the current work of the Working Group would greatly assist in facilitating electronic commerce in international trade, the Commission reaffirmed the mandate of the Working Group to develop a legislative text on electronic transferable records.[15]

12. At its fiftieth session (Vienna, 10-14 November 2014), the Working Group continued its work on the preparation of draft provisions as presented in document A/CN.9/WG.IV/WP.130 and Add.1. Subject to a final decision to be made by the Commission, the Working Group agreed to proceed with the preparation of a draft model law on electronic transferable records (A/CN.9/828, para. 23). It was suggested that the draft Model Law should provide for both electronic equivalents of paper-based transferable documents or instruments and for transferable records that existed only in an electronic environment. It was agreed that priority should be given to the preparation of provisions dealing with electronic equivalents of paper-based transferable documents or instruments, and that those provisions should be subsequently reviewed and adjusted, as appropriate, to accommodate the use of transferable records that existed only in an electronic environment (A/CN.9/828, para. 30). Part II of this note contains the draft provisions reflecting the deliberations and decisions of the Working Group during that session (A/CN.9/828, paras. 20-111).

II. Organization of the session

13. The Working Group, composed of all States members of the Commission, held its fifty-first session in New York from 18 to 22 May 2015. The session was attended by representatives of the following States members of the Working Group: Armenia, Austria, Belarus, Brazil, China, Colombia, Denmark, Ecuador, France, Germany, Hungary, India, Indonesia, Iran (Islamic Republic of), Italy, Japan, Kuwait, Liberia, Malaysia, Mexico, Pakistan, Poland, Republic of Korea, Russian Federation, Singapore, Spain, Thailand, Turkey, United States of America and Venezuela (Bolivarian Republic of).

14. The session was also attended by observers from the following States: Belgium, Egypt, Libya, Malta, Myanmar, Qatar and Sweden.

15. The session was also attended by observers from the European Union.

16. The session was also attended by observers from the following international organizations:

International non-governmental organizations: African Center for Cyberlaw and Cybercrime Prevention (ACCP), Alumni Association of the Willem C. Vis International Commercial Arbitration Moot (MAA), American Bar Association (ABA), CISG Advisory Council, Comité Maritime International (CMI), European

[14] Ibid., *Sixty-ninth Session, Supplement No. 17* (A/69/17).
[15] Ibid.

Law Students' Association (ELSA), International Federation of Freight Forwarders Associations (FIATA), and Law Association for Asia and the Pacific (LAWASIA).

17. The Working Group elected the following officers:

Chairman: Ms. Giusella Dolores FINOCCHIARO (Italy)

Rapporteur: Ms. Lasminingsih PRADJAKUSUMAH (Indonesia)

18. The Working Group had before it the following documents: (a) Annotated provisional agenda (A/CN.9/WG.IV/WP.131); (b) A note by the Secretariat on draft provisions on electronic transferable records (A/CN.9/WG.IV/WP.132 and Add.1); and (c) Mobile commerce/payments effected with mobile devices, Possible future work — Proposal by Colombia (A/CN.9/WG.IV/WP.133).

19. The Working Group adopted the following agenda:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Consideration of the draft provisions on electronic transferable records.
5. Technical assistance and coordination.
6. Other business.
7. Adoption of the report.

III. Deliberations and decisions

20. The Working Group engaged in discussions on the draft provisions on electronic transferable records on the basis of document A/CN.9/WG.IV/WP.132 and Add.1. The deliberations and decisions of the Working Group are reflected in chapter IV below. The Secretariat was requested to revise the draft provisions to reflect those deliberations and decisions.

IV. Draft provisions on electronic transferable records

Draft article 10. [Paper-based transferable document or instrument] [Operative electronic record] [Electronic transferable record]

Paragraph 1

21. With regard to paragraph 1, different proposals were made. One proposal was to combine and simplify subparagraphs 1(a) and (b). In response, it was said that that proposal omitted to identify the electronic transferable record, which was one of the two elements needed to achieve functional equivalence of the use of paper-based transferable documents or instruments, the other being control.

22. Another proposal was to include in draft article 10 the concept of uniqueness in order to achieve singularity of claims. In support, it was said that the notion of control alone did not suffice to achieve singularity given the difference between control itself and its object, i.e., the electronic transferable record.

23. In response, it was said that the Working Group had already discussed the concept of uniqueness at its previous sessions. It was stated that the concept of "control" resulted in the singularity of claims. It was also said that draft article 10 together with the definition of electronic transferable record contained in draft article 3 could provide adequate safeguard against the possibility of multiple claims.

24. With regard to subparagraph 1(a), broad support was expressed for the retention of the words in the first set of square brackets. Concerns were expressed that the second set of square brackets could be viewed as introducing an additional definition of electronic transferable record beside that provided in draft article 3.

25. In response, it was said that the words in the first set of square brackets did not describe how to identify the electronic transferable record, whereas the words in the second set of square brackets were preferable as they did so by referring to "authoritative information". It was added that the words "authoritative information" implied a useful reference to the notion of uniqueness. It was proposed to include the words "containing the authoritative information" in the definition of electronic transferable record under draft article 3. However, it was pointed out that the purpose of a definition was to explain the meaning of a term and should not have operative effect.

26. After discussion, the Working Group agreed to retain the words "to identify that electronic record as the electronic transferable record" outside the square brackets and to delete the second set of square brackets. The Working Group further agreed to include in the definition of electronic transferable record the words "containing the authoritative information" in square brackets after the words "[an electronic record]" for further consideration of the Working Group.

Paragraph 2

27. With regard to the alternative wording in square brackets "legally relevant" and "authorized", different views were expressed. It was said that an electronic transferable record should only reflect authorized changes as those were relevant for ensuring integrity. It was stated that those changes would be authorized by system designers. Some support was also expressed for retaining the words "legally relevant" or using the word "legitimate".

28. However, it was also said that the term "authorized" would introduce a standard for electronic transferable records that did not exist for paper-based documents or instruments. In that regard, it was noted that any "authorized" change would be authorized by the parties to a transaction and not by a system developer. It was explained that only substantive law and party autonomy were relevant to define authorized changes and that therefore both drafting suggestions should be deleted. In that line, it was suggested to delete the words ", including any [legally relevant][authorized] change that arises [throughout its life cycle] [from its creation until it ceases to have any effect or validity]," since the draft definition of electronic transferable record already covered all changes in the life cycle of an electronic transferable record. In response, it was said that that suggestion did not capture the dynamic nature of an electronic transferable record, in which information necessarily changed. Reference was also made to draft articles 21 and 27 as relevant for the notion of integrity.

29. The Working Group agreed to retain the words "from its creation until it ceases to have any effect or validity" outside square brackets and to delete the words "life cycle" throughout the draft provisions.

30. After discussion, the Working Group agreed to delete the words "legally relevant", and to retain the words ", including any [authorized] change that arises from its creation until it ceases to have any effect or validity," in square brackets for further consideration.

Draft article 18. Delivery

31. It was recalled that under substantive law the transfer of a paper-based transferable document or instrument might require both the delivery of that document or instrument and its endorsement. In that regard, it was explained that the respective draft provision would therefore have to provide for the functional equivalent of both delivery and endorsement. However, it was added, under its current formulation, draft article 18 could be misread as establishing the transfer of an electronic transferable record, and not the transfer of control over that record, as functional equivalent to delivery.

32. In that line, broad support was expressed for adopting the alternative text of draft article 18 proposed in paragraph 33 of A/CN.9/WG.IV/WP.132/Add.1. It was indicated that the draft definition of transfer was redundant under that alternative draft of article 18 and therefore should be deleted and the words "transfer of control" should be used throughout the text where needed. As an editorial matter, it was also suggested to merge draft articles 17 and 18 to further improve clarity.

33. The Working Group agreed to retain the text of draft article 18 contained in paragraph 33 of A/CN.9/WG.IV/WP.132/Add.1 and to place it in draft article 17 as its paragraph 3. The Working Group further agreed to delete the definition of "transfer" contained in draft article 3.

Draft article 17. Possession

34. Different views were expressed with respect to the alternative wording in subparagraph 1(b)(i). It was stated that the term "generated" was used in other UNCITRAL texts without difficulty and was therefore preferable. However, it was noted that the term "issued" was used in the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (New York, 2008) (the "Rotterdam Rules"). In response, it was said that the term "issued" had substantive law implications, and that therefore it was appropriate for a substantive text such as the Rotterdam Rules, but not for an enabling text such as the draft provisions (see also A/CN.9/828, paras. 52-54).

35. After discussion, the Working Group agreed to retain the term "generated" outside square brackets and to delete the term "issued".

Draft article 12. Time and place of dispatch and receipt of electronic transferable records

36. It was recalled that draft article 12 was based on existing UNCITRAL provisions dealing with electronic contracting. It was noted that time and place of dispatch and receipt had different relevance for contract formation and management,

and for the use of electronic transferable records. In that line, broad support was expressed for the view that the alternative text in paragraph 5 of document A/CN.9/WG.IV/WP.132/Add.1 was preferable to paragraphs 1 and 2 of draft article 12. It was further noted that registry systems would record the relevant events in the life cycle of the electronic transferable record with time-stamping and that users of those systems would agree to contractual rules containing a choice of applicable law. Therefore, it was concluded, time and place of dispatch and receipt had limited practical relevance for electronic transferable records.

37. In response, it was said that private international law rules relied on the place of the transfer of paper-based documents or instruments to determine the applicable law. Hence, determining the place of receipt and dispatch of electronic transferable records was needed to provide legal certainty. It was added that the existence of different laws was a reality and that one purpose of the draft provisions was to pursue legal harmonisation.

38. It was further suggested that recording the time of endorsements was necessary to establish the sequence in the action of recourse given that the dematerialised nature of electronic transferable records did not make that sequence apparent as in paper-based documents or instruments.

39. One proposal was to include the words "unless otherwise agreed" at the beginning of draft article 12 to clarify that parties had autonomy in determining time and place of dispatch and receipt of electronic transferable records. In response, it was clarified that draft article 5 on party autonomy would apply to draft article 12.

40. The Working Group agreed to (i) substitute draft article 12, paragraphs 1 and 2 with the alternative text contained in paragraph 5 of A/CN.9/WG.IV/WP.132/Add.1; (ii) retain the words "or permits" outside the square brackets in the resulting draft article 12, paragraph 1; and (iii) retain draft article 12, paragraphs 3 and 4 in square brackets for further consideration of the Working Group.

"Where the law requires or permits"

41. With regard to the alternative texts proposed to reflect instances in which the law required or permitted certain actions, different views were expressed.

42. Broad support was expressed for the view that a requirement would not include cases in which the law merely permitted an action. Therefore, it was suggested that the words "or permits" should be retained outside square brackets in the alternative text proposed under paragraph 5 of document A/CN.9/WG.IV/WP.132/Add.1. However, the view was expressed that reference to requirement in the law would include as well instances in which the law merely permitted an action (see also A/CN.9/WG.IV/WP.132/Add.1, para. 8) and that therefore the words "or permits" were redundant and should be deleted.

43. The view was also expressed that draft article 12 should refer to the consequences in case a requirement was not met in order to deal with instances of permission. To that end, different drafting proposals were made. In response, it was explained that any legal requirement implied consequences for the case it was not met, and that therefore the suggested language was redundant. For the sake of

clarity, it was suggested that such understanding should be contained in explanatory materials accompanying the draft provisions.

44. With regard to the alternative drafts of article 12 under paragraphs 9 and 10 of document A/CN.9/WG.IV/WP.132/Add.1, it was said that the use of the word "shall" was preferable. It was noted that the words "may be" used in the two other alternative drafts would not be appropriate for instances "where the law requires".

45. A concern was expressed that the word "shall" could be misread as establishing new substantive requirements that would apply where the law permits an outcome. It was therefore suggested that language such as "the law is met" be used to address mandatory and permissive situations together. In response, it was stated that, in line with the principle of non-discrimination, where the law provided a possibility, a reliable method should be used only in case a party decided to avail itself of that possibility.

46. The Working Group requested the Secretariat to revise the draft provisions referring to requirement and permission in light of the text adopted for draft article 12, paragraph 1, and to reflect in explanatory materials the understanding that any legal requirement implied consequences for the case it was not met.

Draft article 14. [Issuance of] multiple originals

47. It was suggested that draft article 14 should focus on transferable documents as only those documents were in practice concerned by the use of multiple originals. In response, it was noted that uniform and national laws on multiple originals of transferable instruments, namely bills of exchange, existed and that those laws needed to be transposed in an electronic environment, too. In that respect, it was also noted that bills of exchange might be excluded from the scope of the draft provisions under draft article 2, paragraph 3.

48. A question was raised whether draft article 10, paragraph 1(a), in the part preventing the unauthorized replication of an electronic transferable record implicitly admitted its authorized replication and therefore the issuance of multiple originals. In that case, it was added, draft article 14 might be redundant.

49. In response, it was noted that that portion of draft article 10 dealt with copies, which did not have the same legal effects as original electronic transferable records, while draft article 14 explicitly enabled the use of multiple original electronic transferable records. Hence, it was concluded, draft article 14 should be retained.

50. After discussion, the Working Group agreed to retain draft article 14, paragraph 1, outside square brackets. It also agreed to remove the second set of square brackets, to delete the word "[operative]" and to insert the word "transferable" between "electronic" and "records".

51. It was indicated that the rule in draft article 14, paragraph 2, was useful but had a substantive nature. It was therefore suggested that it should be redrafted so as to limit its scope to cases where substantive law contained a requirement to indicate the number of multiple originals. The Working Group agreed on that suggested approach, pending consideration of a new text at a future session.

52. It was further indicated that draft article 14, paragraph 3, contained a substantive rule that was not appropriate for the draft provisions. It was added that

article e8 of the Supplement to the Uniform Customs and Practice for Documentary Credits for Electronic Presentation ("eUCP") was not appropriate in that context since it dealt with both originals and copies. After discussion, the Working Group agreed to delete draft article 14, paragraph 3.

Draft article 23. Change of medium

53. It was alternatively indicated that draft article 23 should aim at protecting the rights of the issuer, of the obligor and of the holder, and it was suggested that its focus should change accordingly. It was added that challenges were posed by the variety of schemes used in the various paper-based transferable documents or instruments, and, in particular, by the fact that issuer and obligor (drawee) did not correspond in a bill of exchange.

54. It was suggested that the draft article should be simplified in order to provide the flexibility needed to accommodate business practice. In that line, it was indicated that its main goal was to enable change of medium while ensuring that no information would be lost because of that change. It was further indicated that change of medium should not affect in any manner the rights and obligations of the parties.

55. It was added that the draft provision should indicate that the replaced document, instrument or record should cease to have any legal effect or validity. It was suggested that the draft article should set forth an obligation to retain the replaced document, instrument or record in order to facilitate verification of information in case of dispute.

56. It was also suggested that the draft article should explicitly require the insertion of a statement indicating the change of medium in the replacing document, instrument or record. It was explained that such provision would not create a new information obligation, as change of medium was an event to be recorded under general rules on integrity.

57. The following text of draft article 23 was suggested:

"1. A change of medium of a paper-based transferable document or instrument to an electronic transferable record may be performed if a method that is as reliable as appropriate for the purpose of the change of medium is used whereby:

(a) The electronic transferable document includes all the information contained in the paper-based transferable document or instrument;

(b) A statement indicating a change of medium is inserted in the electronic transferable record;

(c) A statement indicating that the paper-based transferable document or instrument has ceased to have any effect or validity is inserted in the paper-based transferable document or instrument; and

(d) The paper-based transferable document or instrument is retained.

2. Upon issuance of the electronic transferable record in accordance with paragraph 1, the paper-based transferable document or instrument ceases to have any effect or validity.

3. A change of medium in accordance with paragraph 1 does not affect the rights and obligations of the parties."

58. It was explained that the requirements contained in paragraph 1, subparagraphs (a) to (d) were concurrent and that the sanction for non-compliance with any of them was the invalidity of the change of medium. It was also explained that the obligation to retain the document, instrument or record terminated due to change of medium was the same regardless of the medium.

59. With regard to subparagraph 1(d), it was said that the retention of a paper-based transferable document or instrument would be subject to different requirements than the retention of an electronic transferable record. It was further said that the requirements for retention of a paper-based transferable document or instrument would be set forth in substantive law.

60. A further suggestion was to recast the draft proposal to clearly set out the criteria for the reliable method as a new paragraph 2. According to that proposal, the word "whereby" in paragraph 1 would be deleted and the new paragraph 2 would begin with the words "For the change of medium to take effect, the following requirements shall be met:". Numbering and cross-reference to paragraphs would change accordingly. That proposal found broad support.

61. An additional suggestion was to include paragraph 3 in the chapeau of paragraph 1 to simplify the proposal. In response, it was said that it should be the result of paragraph 3 as a statement of law, and not the result of the use of a reliable method referred to in the chapeau of paragraph 1, that the rights and obligations of the parties were not affected, and that therefore those rights and obligations should be addressed separately for the sake of clarity.

62. A concern was expressed that the draft proposal did not determine whose consent was needed for a change of medium and that, as a result of the change of medium, parties could be obliged to use electronic means. In response, it was recalled that draft article 23 would be subject to draft article 13, which contained the general rule that the use of electronic means was voluntary. In addition, it was clarified that draft article 23 was intended to accommodate electronic transferable records corresponding to different types of paper-based transferable documents or instruments, and that substantive law would identify those parties whose consent was relevant for change of medium.

63. It was suggested to delete subparagraphs 2(c) and (d), since those requirements were not necessary and might result in practical challenges. In response, it was said that those requirements aimed at preventing fraud, as an obligor might not be able to determine on its face the invalidity of a paper-based transferable document or instrument that had been subject to change of medium. It was added that the compliance with subparagraph 2(c) as a condition for validity of the change of medium would prevent fraud. In turn, it was said that commercial operators could voluntarily include statements and adopt retention practices, if deemed useful. Broad support was expressed for the deletion of subparagraphs 2(c) and (d).

64. After discussion, the Working Group agreed: (i) to delete the words "whereby" in paragraph 1; (ii) that the new paragraph 2 would begin with the words "For the change of medium to take effect, the following requirements shall be met:"; (iii) to

delete subparagraphs 2(c) and (d); (iv) and to delete paragraphs 4 and 5 of draft article 23 contained in paragraph 45 of document A/CN.9/WG.IV/WP.132/Add.1 as a result of the newly adopted draft article 23. The Working Group requested the Secretariat to prepare a corresponding provision for the change from electronic to paper medium.

Draft article 25. Termination of an electronic transferable record

65. The Working Group recalled its decision to delete the definition of "transfer" contained in draft article 3 (see paragraph 33 above).

66. It was said that the dematerialized nature of an electronic transferable record made its destruction difficult, which posed a risk of further circulation of the record to be destroyed, particularly when an issuer wished to destroy the original instrument when re-issuing that instrument. Therefore, it was stated that a provision on termination was necessary in order to provide a functional equivalent to the destruction of the paper-based instrument.

67. In response, it was explained that a distinction should be made between termination and destruction. It was said that the contract would provide for the instrument's effectiveness to cease upon performance, and that termination was not made dependent upon formal requirements being met. Therefore, a functional equivalence rule on termination was not necessary. It was, however, suggested that a reliable method would be required to ensure that an electronic transferable record ceased to have effect.

68. After discussion, the Working Group agreed to delete draft article 25.

Draft article 26. Use of an electronic transferable record for security rights purposes

69. It was indicated that paper-based transferable documents or instruments were commonly used as collateral for security rights purposes and that the draft provisions should enable the same use of electronic transferable records. It was further indicated that the draft provisions should not aim at displacing any rule of law on security rights, in line with the general principle of their non-interference with substantive law.

70. It was said that whilst draft article 26 could be unnecessary, it may serve a useful declaratory value.

71. It was noted that the alternative draft of article 26 contained in paragraph 67 of document A/CN.9/WG.IV/WP.132/Add.1 referred to notions already contained in the draft provisions such as delivery or endorsement of electronic transferable records with respect to security rights. It was indicated that that alternative draft contained also references to substantive law concepts, such as "perfection of security rights or interests", which had different meaning in the various legal systems, and that therefore such references could introduce elements of disharmony.

72. It was stated that one definition of "securities" included security rights. Hence, the concern was expressed that the exclusion in draft article 2, paragraph 2, of securities from the scope of application of the draft provisions could be read as preventing the use of electronic transferable records for security rights purposes. In response, it was stated that the word "securities" in draft article 2, paragraph 2, did

not extend to the use of electronic transferable records as collateral. Broad support was expressed for clarifying in explanatory materials on draft article 2, paragraph 2, that the draft provisions did not prohibit the use of electronic transferable records as collateral.

73. After discussion, the Working Group agreed that draft article 26 should be deleted. The Working Group also requested the Secretariat to clarify in the materials illustrating draft article 2, paragraph 2, that the term "securities" did not include security rights and that therefore the model law did not prevent the use of electronic transferable records for security rights.

Draft article 27. Retention of [information in] an electronic transferable record

74. Broad support was expressed for the view that draft article 27 aimed at retaining the information contained in an electronic transferable record, but not the transferable record itself. In that line, it was said that an assumption underlying draft article 27 was that the record to be retained had been terminated and could not further circulate. Therefore, the retained electronic record could not meet anymore the requirements of an electronic transferable record.

75. It was explained that different retention requirements could be contained in various pieces of legislation and that each law reflected a different goal. For instance, special retention and archival requirements could be set forth for tax and accounting purposes, whereas, it was noted, draft paragraph 1 aimed at providing general retention requirements for evidentiary purposes. It was added that such general rule on retention requirements could be found in the law on electronic transactions and that therefore draft paragraph 1 was redundant.

76. It was said that draft paragraph 2 specified the principle that the requirements set forth in draft paragraph 1 could be fulfilled directly or with the assistance of a third party. However, it was added, because paragraph 1 focused on a requirement and not a party, paragraph 2 was unnecessary.

77. After discussion, the Working Group decided to delete draft article 27.

Third-party service providers

78. With respect to draft section D relating to third-party service providers, it was indicated that its general approach was over-regulatory. It was added that the enabling scope of the draft provisions was not compatible with regulatory concerns, which should be addressed in other legislation, and that it was not appropriate for the draft provisions to contain any regulatory sanction. It was added that the subject dealt with in draft articles 28 and 29 could be addressed in explanatory material or a guidance document. It was further noted that developments in technology and business practice recommended a flexible approach. It was stressed that the draft provisions should leave freedom of choice of third-party service providers as well as of the type of services requested and their reliability level.

79. Moreover, it was noted that the draft definition of "third-party service providers" contained in draft article 3 encompassed a large number of third parties involved in the use of electronic transferable records, such as lawyers and accountants, and that those third parties would not be in a position to meet the requirements set forth in draft articles 28 and 29. It was further indicated that the

relevant notion of "third-party service providers" seemed to focus on providers of technology used for the management of electronic transferable records. It was suggested that that draft definition should be revised accordingly.

80. However, the view was also expressed that one goal of the draft provisions was to increase confidence in the use of electronic transferable records, and that setting forth minimum requirements for providers of services related to the use of those records would have a positive impact on building that confidence. It was added that providing guidance, including through guidelines, on the matters dealt with by draft articles 28 and 29 would increase legal harmonisation, which was also a goal of the draft provisions. It was added that, lacking a regulation of minimum legal standards, a possibility existed, especially in oligopolistic markets, that the freedom of contract of users would be limited by the offer of similar contractual conditions by third-party service providers.

81. A suggestion was made that voluntary compliance schemes for the provision of services, whose adoption would give rise to legal presumptions, could offer a solution to some of the concerns expressed. However, it was added, the Working Group was not the right forum for that discussion given the enabling nature of the draft provisions.

82. After discussion, the Working Group decided to delete draft articles 28 and 29 as well as the definition of "third-party service provider" contained in draft article 3 and to place the material related to the subject of third-party providers in explanatory material or a guidance document.

"Control" and "Possession"

83. Broad agreement was expressed that control was the functional equivalent of possession. However, it was noted that the different understandings of possession and control in various legal systems created significant difficulty in defining control. One proposal to overcome that difficulty was to define control as the functional equivalent of possession and to leave the definition of "possession" to national law.

84. The Working Group agreed that open questions with regard to control were whether there was a need for: (i) a functional equivalence rule defining possession as control as in draft article 17; (ii) a definition of control or whether that definition was already contained in draft article 17; (iii) a definition of possession or whether that definition could be left to national law; and (iv) a list of requirements for a system concerning the security of transfer of an electronic transferable record.

85. A proposal was made to address concerns expressed with respect to avoiding multiple claims for performance:

> "Article 10. Paper-based transferable documents
>
> 1. Where the law requires a paper-based transferable document, or provides consequences for its absence, that requirement is met by an electronic record, provided that it replicates all the functions of a transferable document.
>
> 2. If a reliable method can be employed to identify an electronic record as an electronic transferable record that contains authoritative information constituting an electronic transferable record, and that always retains its

integrity, that electronic record may be deemed to have replicated all the functions of a transferable document.

3. If a reliable method can be employed to identify a person as one who has control of an electronic transferable record, that method is also deemed to have met the requirements of paragraph 1 of this article.

4. A person in control refers to a person reliably identified as one to whom an electronic transferable record is issued or transferred."

86. It was explained that the purpose of that proposal was to avoid multiple claims by combining the two prevailing approaches used to achieve that goal, namely "singularity" and "control". It was further explained that the "singularity" approach required the identification of an electronic record as the electronic transferable record that contained authoritative information through the use of a reliable method, while the "control" approach focused on the use of a reliable method to identify the person in control of the electronic transferable record. It was added that draft article 17 would need to be redrafted if the proposal was adopted. A comment was made that the "singularity" approach could apply in particular to token-based systems while the "control" approach could apply in particular to registry-based systems.

87. It was suggested to place paragraphs 1 and 2 of the proposal in draft article 10. It was also proposed that the reference to authoritative information in draft article 10, subparagraph 1(a), that was deleted according to an earlier decision (see paragraph 26 above) should be reinstated. It was noted that the concept of "integrity" contained in paragraph 2 of the proposal was already included in draft article 10, subparagraph 1(c).

88. It was proposed to discuss the definition of "electronic transferable record" contained in draft article 3 in conjunction with draft article 10. Concerns were expressed on the meaning of "all functions" of an electronic transferable record in paragraph 1 and of "authoritative information" in paragraph 2 of the proposal. With regard to the words "all functions", it was noted that those functions would be set out in substantive law.

89. In response, it was explained that, in order to achieve functional equivalence, "all functions" of a paper-based transferable document or instrument needed to be fulfilled. It was also said that the words "authoritative information" had been included to ensure singularity of the electronic transferable record. It was suggested that the term could be further explained in explanatory material.

90. The view was reiterated that a distinction should be drawn between control and the object of control (see paragraph 22 above) and that the proposal addressed that concern in so far as it contained a reference to "authoritative information". It was further said that only control of the electronic record containing authoritative information would provide the functional equivalent of possession of the paper-based transferable document or instrument, as both elements were necessary (see paragraph 21 above). Reference was made to Section 7-106 of the Uniform Commercial Code as an example of legislation endorsing that approach. In response, it was clarified that Section 7-106 of the Uniform Commercial Code only provided for "authoritative copy" as a safe harbour provision where a token system was used, and did not apply to a registry system. It was indicated that, while there

was no common understanding of the term "control", the approach taken in the proposal was acceptable in principle.

91. A proposal was made to include elements of paragraphs 3 and 4 of the proposal in draft article 17, paragraph 1(a) as follows:

> "A method is used to establish exclusive control of that electronic transferable record by a person and to reliably [identify] [establish] that person as the person in control."

92. It was also proposed to place draft articles 10 and 17 consecutively.

93. A concern was expressed that the word "exclusive" might lead to confusion, since control by definition was exclusive. In response, it was said that the notion of "exclusive" control might be obvious to some, but that the word "exclusive" could provide useful clarification. It was further stated that in the electronic environment there could be concurrent control of an electronic record by more than one person, and that therefore the word "exclusive" would provide clarity if draft article 17, paragraph 1(a), was intended to require exclusive control. Alternatively, it was added, clarification could be included in explanatory materials. In addition, it was said that that proposal would render paragraph 2 of draft article 17 redundant.

94. The Working Group agreed to retain the proposed text of draft article 17, paragraph 1(a), included in paragraph 91 above, and to delete draft article 17, paragraph 2.

Draft article 3. Definition of electronic transferable record

95. It was suggested that the definition of electronic transferable record should indicate that the electronic record that complied with the requirements set forth in draft article 10 was an electronic transferable record. In response, it was noted that draft article 10 dealt with the use of an electronic transferable record and that mere reference to that article would not suffice to define an electronic transferable record.

96. The view was also expressed that a definition of electronic transferable record would result from the joint reading of the definition of paper-based transferable document or instrument and of draft article 10 establishing functional equivalence between an electronic transferable record and a paper-based transferable document or instrument.

97. In response, it was said that a definition of electronic transferable record was needed for those electronic transferable records existing only in electronic form. In turn, it was recalled that current deliberations of the Working Group were limited to electronic transferable records that were functional equivalents of paper-based transferable documents or instruments, and that electronic transferable records existing only in electronic form would be discussed only at a later stage.

98. It was suggested that the definition of electronic transferable record should indicate that that record should contain the same information as its paper-based equivalent. It was added that draft article 15, on information requirements, was insufficient to that end.

Draft article 10. [Paper-based transferable document or instrument] [Operative transferable record] [Electronic transferable record]

99. A proposal was made to recast draft article 10, paragraph 1 as follows:

> "1. Where the law requires a paper-based transferable document or instrument or provides consequences for its absence, that requirement is met by an electronic record if:
>
> (a) The electronic record contains the information that would be required to be contained in an equivalent paper-based transferable document or instrument; and
>
> (b) A method is employed:
>
> (i) That is as reliable as appropriate to identify that electronic record as the authoritative record constituting the electronic transferable record [and to prevent its unauthorized replication];
>
> (ii) To render that electronic record capable of being subject to control from its creation until it ceases to have any effect or validity; and
>
> (iii) That is as reliable as appropriate, to retain the integrity of the electronic transferable record".

100. The following draft definition of electronic transferable record was also suggested, subject to further refinement in view of the discussions on draft article 10:

> "An electronic transferable record is an electronic record that contains all of the information that would make a paper-based transferable document or instrument effective and that complies with the requirements of article 10".

"Authoritative"

101. It was observed that the term "authoritative" was used in national law, for instance in Section 7-106 of the Uniform Commercial Code (see paragraph 90 above). However, it was added, that term required further clarification as different meanings had been attributed to it during the deliberations of the Working Group in light of legal and linguistic differences.

102. It was explained that the term "authoritative" referred to the identification of the operative record by the system. It was further explained that that term did not refer to the uniqueness of the information contained in the authoritative record, or to the "authorizing" function of the authoritative record.

103. In response, it was noted that the term "operative" was also unclear. It was suggested that the notion of control could be used instead. Alternatively, it was suggested that the term "authoritative" should be deleted and that reference to identification of the electronic transferable record as such should be inserted.

104. After discussion, the Working Group decided to retain the term "authoritative" pending further clarification of its meaning, including in explanatory materials, or its substitution with a more adequate word.

"Unauthorized replication"

105. The concern was expressed that the inclusion of the words "[and to prevent its unauthorized replication]" could be read as permitting the replication, albeit authorized, of the electronic transferable record, thus allowing for the circulation of several electronic transferable records and possibly exposing the obligor to multiple claims for performance.

106. It was explained that the notion of electronic transferable record presupposed the existence of only one electronic transferable record containing authoritative information, and that therefore any authorized reproduction could result only in non-transferable electronic records.

107. In response, it was noted that it was impossible to completely prevent replication of electronic records. It was also noted that other draft provisions aimed at preventing multiple claims. Therefore, it was suggested that a provision aimed at preventing unauthorized replication was not useful and posed practical challenges.

108. The Working Group agreed to delete the words "[and to prevent its unauthorized replication]".

V. Other business

109. The Working Group was informed about the possible topics for its future work submitted for the consideration of the Commission at its forthcoming forty-eighth session. In particular, reference was made to the note on possible future work on mobile commerce and mobile payments submitted by the Government of Colombia (A/CN.9/WG.IV/WP.133). That proposal explained that mobile commerce and mobile payments were increasingly in use in emerging economies and that the development of adequate legal rules could promote both electronic commerce and financial inclusion.

110. The Working Group was also informed that additional proposals submitted to the Commission included possible future work on identity management (A/CN.9/854) and on cloud computing (A/CN.9/823).